No. 80-877

JAN 15 1981

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STEPHEN HOPKINS and DOUGLAS D. DONALD,

Petitioners,

-against-

THE RECTOR, CHURCHWARDENS AND VESTRYMEN OF THE PARISH OF CALVARY, HOLY COMMUNION AND ST. GEORGE'S IN THE CITY OF NEW YORK and THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF NEW YORK,
APPELLATE DIVISION, FIRST DEPARTMENT

PETITIONER'S REPLY BRIEF

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Respondent implicitly accepts Petitioners' contentions that the question presented is an important one, has not previously been passed upon directly by this Court, and warrants this Court's attention.

We devote our reply then to Respondent's contentions that the constitutional issue has not been properly presented.

I. THE CASE PRESENTS MATERIAL ISSUES OF FACT

As Respondent itself acknowledges, it has rested its case on a combination of appraisals, financial statements, summaries of investment portfolio performance, and statements of operating income and expenses of the particular properties. (Resp. Br. 6) In its starkest terms, Respondent's

claim that there are no issues of fact boils down to an assertion that these documents constitute "unimpeachable... documentary evidence" and "uncontroverted facts" (Resp. Br. 25, 27-28), whereas Petitioners' analysis of these documents and Petitioners' presentation of additional evidence are merely "frivolities, irrelevancies, speculations, philosophical convictions and legal conclusions" (Resp. Br. 27). Shorn of its colorful verbiage, this argument reduces to nonsense. With the exception of its portfolio analyses, the evidence presented by Respondent consists of various opinions (most of which are unsworn and extra-judicial). The appraisals are opinions of the appraiser as to the value of the properties, the financial statements are

opinions of accountants concerning the financial condition of the Respondent; and the statements of operating income and expenses of the particular properties are opinions of others (unnamed) who prepared such statements. Such documents can have little or no meaning unless those analysing them have access to the underlying data and can cross-examine the compilers concerning their assumptions and analytical approaches.

Not being in a position to see the underlying data nor to cross-examine, Petitioners did the next best thing -- they analysed Respondents' documents, noted internal inconsistencies and discrepancies with known facts, and stated their expert opinions regarding the methods employed. Thus, what was presented to the court of

first instance was not "unimpeached fact" on one side and unsubstantiated opinion on the other, as Respondents would have this Court believe, but rather expert opinion on both sides. Such a conflict of expert opinions raises issues of fact which must be tried. See Petitioners' Brief, pp. 31-35.

Little need be said concerning Respondents' comments on specific factual issues:

(a) Sufficiency of the Church's income to cover expenses. Respondent disposes of this issue simply by distorting it. Petitioners have never claimed that income should be assumed even in the absence of equivalent capital appreciation, but only that, in the context of an investment policy

which expressly chose to maximize capital return while minimizing current income, proper accounting calls for treating a reasonable portion of capital appreciation as if it were income.

The true issue on this point is which accounting method is correct, an issue on which the opposing experts differ and on which a triable issue of fact is therefore presented.

(b) Memorial House. Respondent ridicules Petitioners for "averaging" land values of comparable sales and claiming as a result that the value attributed to the Memorial House land should be higher. Respondent overlooks that the "averaging" concept was not invented by Petitioners but was taken directly from Respondent's appraisal

report in which properties were reported as having an "Average Selling Price Attributable to the Land: $41.50 Per Square Foot" for properties on Third Avenue and "$38.67 Per Square Foot" for properties located on side streets. The appraisal virtually raised its own question concerning the methodology applied by arbitrarily valuing the land at $35 per square foot without providing any explanation whatsoever for the departure from the average values the appraiser had previously noted.

Respondent similarly ignores the record in asserting that Petitioners "do not deny the property [Memorial House] was not being utilized for any purpose at the time of the Parish's consolidation." (Resp. Br. 30-31). To

the contrary, an affidavit of Douglas D. Donald sworn to August 21, 1979 asserts that "Prior to 1976, Memorial House was extensively used for Parish activities such as offices for the Rector and Assistant Rector, a Sunday School, meeting rooms and dining rooms, benefits, charity sales, gymnasium and other such uses."

Respondent also obscures the record in asserting that there is no triable issue as to whether the YMCA would remain as a tenant because "The uncontroverted facts show... that the YMCA served notice of its intention to terminate its tenancy." (Resp. Br. 32). In fact, Petitioners had presented strong evidence that the YMCA did not give notice and vacate voluntarily. (Pet. Br. 19-21).

(c) 175 Third Avenue. Again, Respondent misstates the record with respect to the offer of $140,000 for 175 Third Avenue alone. There is absolutely nothing in the record supporting Respondent's expression of doubt concerning this offeror's "ability to close the transaction even if his offer had been accepted." (Resp. Br. 33n). Respondent claims that this offeror's lack of plans for continuing the Thrift Shop operations at 175 Third Avenue influenced Respondent's decision to reject his offer (Resp. Br. 33n), but neglects to mention that the present purchasers also provided no assurance that the Thrift Shop could continue operations at its present location.

Respondent begs the question in

asserting that the seven vacant apartments at 175 Third Avenue could not have been rented without "substantial expenditures for extensive repairs and replacements." (Resp. Br. 24n).*

As set forth at pages 22-23 of the Petitioners' original brief, Petitioners had asserted that the cost of repairs to 175 Third Avenue would be quite minor. Respondent then seeks to circumvent the repair cost issue by pointing to the appraiser's description of the property as an "old law tenement" which was "in only fair condition at best" and the appraiser's comment that installation of separate heating facilities might be necessary. (Resp.

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*Respondent makes no mention of the fact that one store was also maintained vacant.

Br. 35). This hardly avails Respondent; the quoted statements are far too vague to constitute evidence of rehabilitation cost or non-rentability. Even if these statements had evidentiary value, they would show only that inconsistencies within the appraisal report itself raise a triable issue of fact.*

(d) Conflict of Interest. We fail to see the significance Respondent finds in the fact that Petitioners have refrained from directly accusing Church spokesmen of acting out of self-interest despite the appearance of possible conflicts of interest. The

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*We find no statement in the appraisal report describing the building as an "old law tenement". Furthermore, it should be noted that the $10,000 valuation was for the building alone, not including land value.

conflicts have not been, and cannot be, proven absent disclosures which Respondent has chosen not to make concerning the identity of the purchasers' banking institutions and Ms. Flynn's interest, if any, as a "professional real estate consultant" in this transaction. What the present record warrants is not irresponsible accusations but healthy skepticism about the objectivity of Respondent's spokesmen and experts.

* * * * * *

Respondents' statement that "Only the two Objectants opposed" (Resp. Br. 5) is not quite correct. New York law requires approval only of the vestry and certain members of the Church hierarchy; no approval from Parish members is necessary. Rel. Corp. L. §40 et

seq. There has in fact never been any referendum on this issue among Parish members. Mr. Hopkins' original Objections, however, filed within a few days after the Church's petition, included a petition opposing the sale signed by ten Parishioners.

The statement that the "deficient operations of the properties in issue were not, and could not be, denied" (Resp. Br. 14) is simply inaccurate and inconsistent with the entire record. (See e.g. Pet. Br. 21-22.)

* * * * *

Finally, Respondent professes to see a reflection of Petitioners' own assessment of the significance of the constitutional issue in the number of lines devoted to that issue at the

Appellate Division level* and in the failure to have raised that issue at Special Term. At Special Term, Petitioners requested a hearing in accordance with a right evidently accorded by statute. CPLR §410. Only when the right to a hearing was denied did a constitutional issue arise. Thus, by raising the issue on appeal, Petitioners raised it at the first opportunity and, thereby, met the jurisdictional requirement of 28 U.S.C. §1257. Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 678-9 (1930).

II. THE PETITION IS TIMELY

Respondent is clearly in error in

*Petitioners' Appellate Division brief presented the issue as follows: "Even if CPLR §410 did not require a hearing, it would still be mandated by due process. U.S. Constitution, Amendments 5 and 14; N.Y.S. Constitution, Article I, Section 6."

claiming that Petitioners' time to appeal runs from the entry of the New York Court of Appeals' order dated May 29, 1980 dismissing the appeal rather than from the Court of Appeals' order dated August 29, 1980 denying leave to appeal. The time for filing a petition for certiorari runs from the last date on which the highest state court rejected an opportunity to review. American Railway Express Co. v. Levee, 263 U.S. 19, 20-21 (1923). As New York practice contemplates that an aggrieved party may successively appeal and apply for leave to appeal (CPLR §§5601, 5602 and 5514(a)), Petitioners would have been derelict in seeking review of this Court without seeking leave to appeal even after the initial appeal had been dismissed. Stratton v. Stratton, 239

U.S. 55 (1915).

Once one is before the Court of Appeals on an appeal from a final order -- whether by direct appeal or by permission -- all issues properly preserved may be reviewed. The only exception is for certified questions pertaining to non-final orders. Compare New York State Constitution Article 6 Section 3 paragraph (b)(6) with paragraph (b)(4).

In their motion for leave to appeal to the Court of Appeals, Petitioners preserved the constitutional issue for review by devoting to it approximately a full single spaced page.

Respondent's contention that Petitioners have "admitted" the lack of a substantial constitutional issue is patently absurd. (Resp. Br. 22-23n). Petitioners merely informed the Court

of Appeals that the prior appeal had been dismissed and Petitioners were, therefore, seeking leave. Had Petitioners intended to waive the constitutional issue, they surely would not have devoted a page to restating it in the motion for leave to appeal.

III. THE CONTROVERSY IS NOT MOOT

Respondent argues that the case is now moot because the parties to the sale went ahead and closed their transaction despite the fact that Petitioners' time to file the present Petition with this Court had not yet expired. Respondent's motion to the Appellate Division to dismiss on this same ground was rejected. (SA1).*

*A supplemental appendix containing the order on the motion to dismiss the appeal is annexed hereto. That court delivered no opinion.

As Petitioners argued to the Appellate Division, and that Court implicitly ruled, the case is not moot as, under New York law, a reversal would nullify the judicial approval required for the conveyance and, therefore, nullify the transfer of title itself. Associate Presbyterian Congregation v. Hanna, 113 App. Div. 12, 98 N.Y.S. 1082 (3rd Dept. 1906); Wilson v. Ebenezer Baptist Church, Inc., 17 Misc.2d 607, 187 N.Y.S.2d 861 (Kings Co. 1959); Application of Margolin, 16 Misc.2d 961, 183 N.Y.S.2d 36 (Kings Co. 1959).

Clearly the transfer is not irreversible. The buyer has taken with knowledge of the risk to the validity of his title and may be obligated to reconvey. The controversy remains justiciable: the Church presumably has as

much interest now as it ever did before in confirming the validity of its ostensible conveyance. Indeed its continuing interest is evidenced by the very facts that it has filed an opposition brief with this Court and that such brief addresses the merits.

This Court has generally followed the view that, if some effective relief may be granted, the case is not moot. See Stern & Gressman, Supreme Court Practice 892-5 (1978). Thus, in Bank of Marin v. England, 385 U.S. 99, 100-101 (1966), a trustee in bankruptcy had sought an order requiring the petitioner bank or the payee of certain checks to turn over the amount of such checks which were issued by the bankrupt before bankruptcy, but were presented and cashed after filing for

bankruptcy. The payee had turned over such funds and did not appeal but might still have sued the bank for contribution. The Court held that the controversy was not moot as it would "strain the concepts of mootness if we required petitioner [bank] to start all over again when the payee sues it for contribution". See also Porter v. Lee, 328 U.S. 246 (1946).

In the present case, relief remains available as reversal would cancel Special Term's approval of the sale and would, therefore, invalidate the transfer. Obviously additional action might be required should the buyer fail to surrender possession voluntarily, but invalidation in the present proceeding would be an essential preliminary step. See Chicago,

R.I. & P.R. Co. v. Perry, 259 U.S. 549 (1922).

CONCLUSION

As Respondent concedes, the constitutional issue presented here is one which warrants the attention of this Court. Respondent attacks only the sufficiency of the presentation of that question. However, the record clearly establishes that there are material factual issues, that the Petition has been timely filed, and that the controversy has not been mooted.

Dated: New York, New York
January 9, 1981

Respectfully submitted,

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Of Counsel,
Michael S. Gruen

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 18, 1980

Present--Hon. Joseph P. Sullivan,
Justice Presiding
Arthur Markewich
Vincent A. Lupiano
Samuel J. Silverman
John Carro,
Justices.

The Rector, Churchwardens and Vestrymen of the Parish of Calvary, Holy Communion and St. George's in the City of New York,

Petitioners-Respondents,
For leave to sell certain of its real property,

Stephen Hopkins and Douglas D. Donald,

Objectants-Appellants,
Attorney General of the State of New York,

Respondent.

Order Denying Motion to Dismiss Appeal
M-4350

An appeal having been taken to this Court by the objectants-appellants from the order of the Supreme Court, New York County, entered on July 9, 1980,

And the petitioners-respondents having moved to dismiss said appeal, as moot,

Now, upon reading and filing the notice of motion, with proof of due service threof, and the papers filed in support of said motion, and the papers filed in opposition or in relation thereto; and due deliberation having been had thereon,

It is ordered that the motion to dismiss said appeal be and the same is denied with $20 costs.

ENTER:

JOSEPH J. LUCCHI

Clerk.